Supreme Court, U.S.
FILED
FEB 8 - 2000
CLERK

(2)

No. 99-959

In the Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

150P

QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioners lacked standing to challenge the government's procurement practices in conjunction with base closings under the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. 2687 note (1994 & Supp. IV 1998).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Air Courier Conference v. *American Postal Workers Union*, 498 U.S. 517 (1991)	9, 11
American Fed'n of Gov't Employees v. *Cohen*, 171 F.3d 460 (7th Cir. 1999)	5, 9, 10, 11
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	6, 8
National Maritime Union v. *Commander, Military Sealift Command*, 824 F.2d 1228 (D.C. Cir. 1987)	9
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)	8
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998)	8
United States v. *Hays*, 515 U.S. 737 (1995)	6

Constitution and statutes:

U.S. Const. Art. III	3, 4, 6, 8
Arsenal Act, 10 U.S.C. 4532	11
Defense Base Closure and Realignment Act of 1990, 10 U.S.C. 2687 note (1994 & Supp. IV 1998)	2
10 U.S.C. 2464 (1994 & Supp. IV 1998)	2, 11
10 U.S.C. 2464(a)(1) (1994 & Supp. IV 1998)	2
10 U.S.C. 2464(a)(2) (1994 & Supp. IV 1998)	3
10 U.S.C. 2464(b)	2
10 U.S.C. 2464(b)(1)	3
10 U.S.C. 2464(b)(2) (1994 & Supp. IV 1998)	3
10 U.S.C. 2467 (1994 & Supp. IV 1998)	11
10 U.S.C. 2469 (1994 & Supp. IV 1998)	11
10 U.S.C. 2469a (Supp. IV 1998)	2, 10

In the Supreme Court of the United States

No. 99-959

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 180 F.3d 727. The opinion and order of the district court (Pet. App. 13a-33a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 15, 1999. A petition for rehearing was denied on September 7, 1999 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on December 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are eleven current and former civilian employees of Air Force depots, a federal government employee labor union, and a non-profit organization interested in the development of the Hill Air Force Base. They filed suit challenging the Department of Defense's decision to allow private contractors to bid on the workload of the Air Force depot at the Newark Air Force Base, Ohio (Newark), which was being closed pursuant to the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. 2687 note (1994 & Supp. IV 1998). Pet. App. 2a.[1] Petitioners did not challenge the closure of the Air Force depots. *Id.* at 5a. Rather, they claimed that the workloads that had been performed at the closed depots were "core logistics" functions that could not be contracted out for performance by non-governmental personnel, pursuant to 10 U.S.C. 2464(b).[2]

---

[1] Petitioners also initially challenged the contracting processes for the Air Logistics Center located at Kelly Air Force Base in Texas and the McClellan Air Force Base in California. After the complaint was filed, however, Congress enacted 10 U.S.C. 2469a (Supp. IV 1998), which provided for public-private bidding on the workloads remaining at those two bases (as well as for all other base closings meeting the statute's timing requirements). Accordingly, on appeal and before this Court, petitioners rely exclusively upon the injuries allegedly caused to them by private bidding on the Newark workloads.

[2] Section 2464, 10 U.S.C., provides that the national defense requires the Defense Department to "maintain a logistics capability (including personnel, equipment, and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements." 10 U.S.C. 2464(a)(1) (1994 & Supp. IV 1998). The Secretary of Defense has exclusive responsibility for designating core logistic functions, *i.e.*, "those logistics activities that are

Further, petitioners claimed that, even if private contractors could properly bid for the work, the Defense Department had improperly forbidden other Air Force depots to bid on some or all of the work. *Id.* at 2a-3a, 18a. The injuries alleged in the complaint to have resulted from those actions were (i) the loss of federal salary and benefits by a former Newark employee who was hired by the private contractor that successfully bid on the Newark workload; (ii) the loss of employment at Newark; and (iii) the loss of employment and enhanced employment opportunities by employees of other Air Force depots that might have bid on the workload, might have won the contract, and might have hired or retained petitioners to perform the work. C.A. App. 19-26.

The district court dismissed the complaint. Pet. App. 13a-34a. The court first held that petitioners lacked Article III standing. *Id.* at 18a-24a. The court concluded that petitioners had failed to allege a concrete, current or imminent injury caused by the allegedly unlawful government actions. *Id.* at 19a-20a. Because petitioners could not challenge the lawfulness of the base closure decisions themselves, the court explained, "the loss of jobs at those air force bases and any injuries which [petitioners] have suffered due to their closure * * * cannot be used to establish an injury in fact." *Id.* at 20a. Beyond that, the court found that petitioners merely raised "the possibility that at some point in the future their situation may be adversely affected by one

---

necessary to maintain the logistics capability." 10 U.S.C. 2464(a)(2) (1994 & Supp. IV 1998). Those activities "may not be contracted for performance by non-Government personnel," 10 U.S.C. 2464(b)(1), unless the Secretary, in his discretion, waives the requirement that the work be performed by a government facility. 10 U.S.C. 2464(b)(2) (1994 & Supp. IV 1998).

or another depot not obtaining the work of a closing facility." *Id.* at 22a. Such "speculative injuries," the court concluded, "do not support a finding of the 'actual and imminent' injury required under Article III." *Ibid.* The court also held that the organizational plaintiffs lacked standing because they failed to show that at least one of their members would have standing. *Id.* at 23a.

In addition to holding that petitioners lacked Article III standing, the district court held that they failed the requirements of "prudential" standing, because they are not within the "zone of interests" of the statutes upon which they rely. Pet. App. 24a-29a. Finally, the court ruled, in the alternative, that petitioners' claims should be dismissed because they address matters reserved to the agency's discretion and because the statutes cited by petitioners are inapplicable to base closings. *Id.* at 29a-33a.

2. The court of appeals affirmed, agreeing with the district court that petitioners lacked Article III standing. Pet. App. 1a-12a. Viewing the complaint in the light most favorable to the petitioners and accepting as true all of the material allegations of the complaint (*id.* at 4a), the court explained that any causal connection between the injuries alleged by petitioners and the conduct of respondents was entirely speculative. "It is difficult to show that those injuries [the loss of possible jobs] are 'caused' by the failure to follow prescribed procedures, or that they would be redressable by the relief the plaintiffs seek." *Id.* at 7a. Petitioners' theory of causation, the court elaborated, requires the speculation that, if prescribed procedures had been followed, other federal bases would have bid on and won the work of the closed bases, and then those other bases would have hired those petitioners no longer employed

by the government, and provided greater job security and opportunities to those individuals already working there. *Id.* at 6a-7a. The court observed, however, that "[o]ther bases might choose not to bid, or might not win a bidding competition," and, "[e]ven if those bases did acquire the workload of the closed bases, [petitioners] might not obtain employment there." *Id.* at 7a. The court held, "[i]f the injury at issue is simply harm to the plaintiffs' employment prospects, that injury is insufficiently concrete and particularized to establish Article III standing" because "[n]umerous acts and facts may injure employment 'prospects' in some unknowable and speculative fashion." *Id.* at 8a.

The court found the case to be unlike *American Federation of Government Employees* v. *Cohen*, 171 F.3d 460 (7th Cir. 1999), where the plaintiffs identified a concrete injury, "were all employees of one arsenal, and maintained that if the Army had complied with the statutes, 'the projects would have been performed at their government facility, thereby preserving federal job opportunities.'" Pet. App. 10a. The court explained that, in this case, by contrast, petitioners' "injuries tend to involve a potential loss of job benefits, not an actual one"; "any benefit loss results most clearly from the unchallengeable and unchallenged decision to close bases"; and petitioners "cannot show a *likelihood*, as opposed to a mere possibility, that a favorable decision of the court would redress their injury." *Ibid.*[3]

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or of

---

[3] The court did not reach the other grounds relied upon by the district court in dismissing the complaint. Pet. App. 12a.

any other circuit. Petitioners largely challenge the court of appeals' application of concededly correct legal principles to their particular case. The context in which the standing issue arises, moreover, is of limited enduring importance. Further review thus is not warranted.

1. a. Petitioners contend (Pet. 7-11) that the court of appeals improperly evaluated their allegations in support of standing by applying a summary judgment standard of review rather than the standard required at the motion to dismiss stage. They are mistaken. The court of appeals explicitly stated that it "viewed [the complaint] in the light most favorable to the plaintiff; all material allegations of the complaint must be accepted as true." Pet. App. 4a. Furthermore, the court properly recognized that petitioners had the burden to plead facts that established standing. *Ibid.*; accord *United States* v. *Hays*, 515 U.S. 737, 743 (1995). In deciding whether petitioners had met this burden, the court of appeals examined the "injuries asserted in the complaint." Pet. App. 3a. Thus, contrary to petitioners' argument (Pet. 8-11), the court of appeals' decision wholly comports with this Court's precedents.

To establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that (2) is fairly traceable to the defendant's conduct and (3) is redressable by the relief requested. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury-in-fact is "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (internal citations and quotation marks omitted).

Petitioners contend that they were injured by the government's decision to permit private contractors to bid upon and win the Newark workload, rather than to

award the work to another Air Force depot facility. Under the allegations of the complaint, however, respondent's actions could injure petitioner only through a series of speculative propositions: (1) despite the Defense Department's finding that "moving the [Newark] work to another Air Force location also would introduce risk to mission performance, to the highly sensitive equipment and to maintenance schedules" (C.A. App. 186-187), the Defense Department would deem another depot qualified to perform the Newark workload and permit it to submit a bid; (2) one of the depots which employ or might employ petitioners would choose to compete for the work; (3) that depot would submit the winning bid and be awarded the work; (4) the winning depot would be required to hire additional civilian personnel to perform such work; (5) petitioners would apply for the jobs at the winning depot even if the jobs were across the country; (6) petitioners would be offered employment on the new workload at the winning depot; and (7) no other intervening economic or contractual developments would affect that depot's willingness to hire or retain petitioners and to afford them the level of federal salary and benefits they desire. In holding that such a tortuous trail of speculation and surmise, frequently dependent upon the actions of third parties, does not satisfy the constitutional requirements of standing under any of this Court's precedents, the court of appeals established no broad new legal principle that merits this Court's review.[4] Even at the motion to dismiss stage,

---

[4] See also Pet. App. 21a (detailing allegations in the complaint, such as claims that "*if* a depot were to bid on and win" the contract, the plaintiffs "would have the *option* of *possibly working* at that depot"; "if a reduction in force ("RIF") were to occur in the

such "unadorned speculation," rife with temporal and decisional contingency gaps that discovery cannot fill, "will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).[5]

Moreover, while a court "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 104 (1998), and "general factual allegations of injury resulting from the defendant's conduct may suffice" to support Article III standing, *Lujan*, 504 U.S. at 561, those principles offer petitioners no aid. Because petitioners rely upon future events in order to demonstrate their injuries, "clear precedent requir[es] that the allegations of future injury be particular and concrete." *Steel Co.*, 523 U.S. at 109. More importantly, petitioners' complaint was not dismissed because the alleged injuries were too generally articulated. In fact, petitioners filed a very specific complaint and supported the allegations with numerous declarations. C.A. App. 13-26. The flaw with petitioners' complaint thus was not the level of detail, but the fact that the injuries clearly alleged were indirect, attenuated, and based upon a series of speculations.

---

future * * * more senior employees would compete for platintiffs' posittions [*sic*] and would displace them"; "*if* the air force base formerly employing those plaintiffs had bid on and won a workload, those plaintiffs' chances of remaining employed or being reemployed by that air force base would *improve*") (emphases added).

[5] Even if the court of appeals had erred in applying well-established law on standing to the facts of this particular case (which it did not), such case-specific error would not merit this Court's review.

b. For similar reasons, the court of appeals correctly held that petitioners' alleged injuries would not likely be redressed by the relief they seek. The complaint sought an injunction invalidating any transfer of the workload to a private contractor and an order requiring that the contract be reopened to bidding by both private and military contractors. C.A. App. 32. Yet the petitioners enjoy at best a remote possibility that such relief would affect or enhance their individual employment opportunities, given that the new contract could be awarded to any number of competing contractors who may or may not (presently or prospectively) employ petitioners.

Finally, petitioners' recharacterization of their injury (Pet. 9) as the denial of the "*opportunity to compete* for continuing federal employment" is to no avail. Nothing in the statutes petitioners invoke or the contracting process they seek to rectify implicates the rights of individuals to seek or retain federal employment. They affect only the rights of other military depots or private contractors—whom petitioners do not represent—to compete for military contracts. See *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 528 n.5 (1991) ("Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury."). In short, because "substantial barriers to the alleviation of the [petitioners'] injury would remain regardless of the outcome of this litigation," *National Maritime Union* v. *Commander, Military Sealift Command*, 824 F.2d 1228, 1236 (D.C. Cir. 1987), the court of appeals' decision was correct and does not merit further review.

2. Contrary to petitioners' argument (Pet. 13-19), the court of appeals' decision does not conflict with *American Federation of Government Employees* v.

Cohen, 171 F.3d 460 (7th Cir. 1999). In *Cohen*, civilian employees at an Army arsenal in Illinois claimed that, when the Army closed an arsenal in Detroit, it improperly allowed a private contractor to take over production of the tank materials, instead of transferring that work to the Illinois facility, which was the Army's only remaining arsenal. The complaint contained allegations from which it could be concluded that applicable law mandated the transfer of the work to the Illinois arsenal and no other facility (military or private), and that the failure to comply with that law and transfer the work was the sole reason for the plaintiffs' loss of employment and benefits. 171 F.3d at 466-467 & nn.6-7.

As the court of appeals explained (Pet. App. 10a), those "[t]raceability and redressability" allegations were not made in this case, nor could they be. Petitioners' claimed injuries involved "a potential loss of job benefits, not an actual one." *Ibid.* Further, the alleged loss is only indirectly traceable to discretionary decisionmaking by the military that would include choosing from among numerous eligible competitors for the Newark work, unlike the mandatory rules that compelled the selection of the single Illinois facility in *Cohen*. *Ibid.*; see also Pet. 18 n.16 (petitioners concede that it is "slightly more complicated to geographically locate the eight hundred lost federal [Defense Department] jobs in this case, than it was to locate the jobs at the Rock Island arsenal in the Seventh Circuit case").

3. This Court's review also is not warranted because the type of standing claim alleged here is unlikely to recur with any significant frequency. While this litigation was pending, Congress enacted 10 U.S.C. 2469a (Supp. IV 1998), which prospectively addressed the use of competitive bidding procedures in the contracting for performance of military depot workloads arising from

base closures. The statutory provisions from which petitioners attempt to extract a legal basis for standing are thus no longer the relevant standard for any future litigation raising claims like petitioners'. Furthermore, there have been no additional base closings since the closure of the bases at issue here. A decision by this Court would thus be of limited future importance or practical prospective import in this area.

Finally, a decision by this Court on the constitutional standing question presented is unlikely to afford even these petitioners relief. The district court dismissed the complaint on alternative grounds which were entirely correct, finding a lack of prudential standing and a nonjusticiable question. Pet. App. 24a-34a. As even the authority on which petitioners rely recognized (*Cohen*, 171 F.3d at 468-473), plaintiffs seeking to perpetuate their federal employment do not fall within the zone of interests of the procurement statutes (10 U.S.C. 2464, 2467, 2469 (1994 & Supp. IV 1998)) that were designed to close bases, consolidate the military workforce, and promote economic efficiency and national security. Indeed, the *Cohen* court ultimately found standing only under the Arsenal Act, 10 U.S.C. 4532, a statute on which petitioners do not rely. The court found no standing to challenge violations of the procurement and laws. 171 F.3d at 463; see also *Air Courier Conference*, 498 U.S. at 525-528 & n.5. The relevant federal statutes, moreover, do not provide judicially administrable standards for second-guessing the national security and military readiness decisions of the Secretary of Defense that underlie the decision to open a military workload to private contractors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
ROBERT M. LOEB
Attorneys

FEBRUARY 2000